2002

Provo City Corporation v. Sean Thompson : Brief of Petitioner

Utah Supreme Court

IN THE UTAH SUPREME COURT

PROVO CITY CORPORATION,	)	Utah Supreme Court
	)	Case No. 20020307-SA
Plaintiff-Petitioner,	)	
	)	Court of Appeals
vs.	)	Case No. 20000071-CA
	)	
SEAN THOMPSON,	)	
	)	
Defendant-Respondent.	)	

BRIEF OF PETITIONER

A PETITION FOR REVIEW OF PROVO CITY V. THOMPSON UTAH COURT OF APPEALS OPINION 2002 UT APP 63

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over both subject matter and procedural issues relevant to this case. Pursuant to Rule 46 (a)(4) of the Utah R. App. P., jurisdiction of this Court is properly invoked because of the following considerations:

A. The decision of the Utah Court of Appeals in this matter was filed on March 7, 2002. That opinion decided important questions of Utah state law, namely the scope and constitutionality of portions of Utah Code Ann. § 76-9-201-(1)(b).

B. While it affirmed the validity and constitutionality of part of § 76-9-201(1)(b), the Court of Appeals also held that other parts of the statute were facially overbroad and, therefore unconstitutional. As provided in Rule 46(a)(4) of the Utah R. App. P., the final interpretation of Utah Code Ann. § 76-9-201(1)(b) has not yet been, but should be, settled by this Court.

C. Utah Code Ann. § 78-2-2(3)(g) confers appellate jurisdiction upon this court to determine and/or review questions of whether a statute of this state complies with requirements of the United States and Utah constitutions.

D. On April 8, 2002, Plaintiff-Petitioner ("Provo") filed with this Court a petition for a writ of certiorari. On August 29, 2002, this Court granted that petition so that it could determine whether all or part of § 76-9-201 (1)(b) is constitutional.

ISSUES PRESENTED AND STANDARDS FOR REVIEW

1. Did the Utah Court of Appeals correctly affirm the conviction of Defendant-Respondent's ("Thompson") for telephone harassment under Utah Code Ann. § 76-9-201 (1) (b) since credible evidence supported the Trial Court's finding that he made repeated harassing telephone calls after having been told to stop? A trial court's findings of fact will generally not be reversed by an appellate court unless those findings are patently contrary to the weight of the evidence and clearly erroneous. *Department of Human Services v. Irizarry,* 945 P.2d 676, 678 (Utah 1997); *MacKay v. Hardy,* 896 P.2d 626, 629 (Utah 1989) [*citation omitted].* This issue was preserved in both at trial (R. 45-31) and before the Utah Court of Appeals (Appellee Brief, 1, 4-10).

2. Did the Court of Appeals incorrectly conclude that part of Utah Code Ann. § 76-9-201 (1)(b) is facially overbroad and thus unconstitutional? A challenge to the constitutionality of a statute raises a question of law which is reviewed for correctness. *State v. Mohi,* 901 P.2d 991,995 (Utah 1995); *Strawberry Electric Service District v.*

Spanish Fork City, 918 P.2d 870, 876 (Utah 1996). When a constitutional issue is raised about a state statute, the presumption is that the statute is valid. Appellate courts try to resolve all questions in favor of constitutionality. *State v. Lopes, 1999 UT 24, 980 P.2d 191, 193.* Provo's attorney implicitly addressed the issue in his closing argument at trial (R. 45-31)[1] and specifically argued the question before the Court of Appeals (Appellee Brief, 6-10) and in its Petition for Writ of Certiorari before this Court (Petition, 5-8).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 76-9-201 Telephone Harassment

(1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number or recklessly creating a risk thereof, the person:

(a) makes a telephone call, whether or not a conversation ensues;

(b) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;

(c) makes a telephone call and insults, taunts or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response;

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[1]In accordance with Rule 24(e) of the Utah R.App. P., in citations to the trial transcript, Provo will first identify the stamped page number found on the lower right corner of the transcript and which is the only number stamped on the transcript. That number is 45. Thereafter, a page number within the transcript is supplied to show a page number in the transcript. Thus, a citation of R. 45-12, gives the transcript stamp number followed by the page in the transcript on which the cited information may be found.

(d) makes a telephone call and uses any lewd or profane language or suggests any lewd or lascivious act; or

(e) makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person.

(2) Telephone harassment is a class B misdemeanor.

Utah Code Ann. § 76-9-201 (amended in 2001)

The provisions of the present § 76-9-201(which were not in force during the time of Thompson's conviction) are set out in Addenda A and B to Provo's brief.

STATEMENT OF THE CASE

On October 29, 1999, Thompson was charged by information with telephone harassment for violating Utah Code Ann. § 76-9-201 (1999). At a bench trial before the Hon. Anthony W. Schofield of the Fourth District Court, Thompson was found guilty of telephone harassment. Thereupon, Thompson appealed to the Utah Court of Appeals. That court affirmed his conviction, relying on language in the second part of subsection (1)(b) of the 1999 telephone harassment statute. *Provo City v. Thompson*, 2002 UT App 63, ¶26, 44 P.3d 828, 834. But the Court of Appeals also held that the first part of subsection (1)(b) was facially overbroad and unconstitutional. *Thompson*, 2002 UT App 63, ¶¶21, 27, 44 P.3d at 833, 834-35.

STATEMENT OF FACTS

1. Thompson and Carolyn Thayer ("Carolyn") had been married (R.45-5, 17), but their marriage ended in divorce some time before May 1, 1999. (R. 45-6). They had one child, a daughter Madison. (R. 45-20).

2. During the late evening of May 1, and the very early hours of May 2, 1999, Thompson repeatedly called Carolyn on the telephone.[2] The calls included a number of crude questions, sexually-charged suggestions, attempts at intimidation and threats to take Madison away from Carolyn. (R. 45-6, 8). At the time Carolyn lived alone with Madison. (R. 45-5). During several of the phone conversations, Carolyn told Thompson to stop calling because he was scaring her, but he persisted in phoning her. (R. 45-8). Thompson did not rebut Carolyn's testimony that she asked him to stop calling, nor did he deny that he repeatedly ignored her requests that he stop. (R. 45-32).

3. Shortly after midnight, Carolyn called the police complaining of telephone harassment. (R.45-9, 12). During the early morning of May 2, Officer Bastian arrived at the place where Carolyn was living. (R. 45-12).

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[2]Carolyn testified that Thompson called her about eighteen times within an hour during the evening-early morning of May 1-2, 1999. (R. 45-7). Officer Michael Bastian of the Provo Police Department ("Officer Bastian"), testified that the caller identification device on Carolyn's phone revealed eleven calls from Thompson to Carolyn during the relevant time period. (R. 45-13). Thompson, himself conceded that he may have called Carolyn some six or seven times during the late evening of May 1 and early morning of May 2, 1999. (R. 45-24).

4. Carolyn testified Thompson's frequent calls frightened her (R. 45-6). When Officer Bastian arrived, he found Carolyn in a "very upset"condition, "very nervous, emotional [and she] appeared kind of scared." (R. 45-12-13).

5. Shortly after Officer Bastian came to Carolyn's residence, the phone rang again. The caller identification signal on Carolyn's phone disclosed another call from Thompson. (R. 45-13). When Officer Bastian picked up the phone, a man responded in a "slurred voice" that he was Thompson. When Officer Bastian asked why he had been calling so frequently that night, Thompson said he wanted to know if his wife loved him and that he wished to see Madison. (R. 45-13-14). Officer Bastian testified that in this conversation, Thompson made no mention at all about any concern he had for Carolyn's health or mental condition. Nor did he mention any fear about Madison's welfare. Thompson only said he wanted to see the daughter. (R. 45-29-30).

6. During the telephone conversation, Officer Bastian told Thompson to stay where he was and await further contact. Soon afterward, Officer Bastian went to Thompson's apartment where the two met face to face. At that time, the officer smelled a strong odor of beer on Thompson. When the officer asked how much alcohol he had consumed that evening. Thompson told him he had drunk three beers in the last hour and more beer earlier. (R. 45-14). Thompson told the officer he was also taking anti-depressant medication, whereupon the officer advised him not to mix prescription drugs with alcohol. (R.45-15). Carolyn testified when Thompson took anti-depressant medication and drank alcohol at the same time, "he goes weird sometimes." (R.45-7).

7. At the apartment, Thompson told the officer the reason he called Carolyn so many times was because he wanted to see his daughter.(R. 45-15) Thompson admits that in the conversation at his residence he forgot to tell Officer Bastian that he was concerned about his ex-wife's mental condition or her alleged threat to harm herself. (R. 45-22-23). He further concedes he never independently called the police to share his concerns about Carolyn's mental state or his fears that she might do herself harm. (R. 45-24).

8. Shortly before 1:00 a.m. on the early morning of May 2, 1999, Officer Bastian cited Thompson for violating the Utah telephone harassment statute, Utah Code Ann. 76-9-201. (R. 1).

9. Both the trial court and the Court of Appeals rejected Thompson's claim that he made repeated calls because of his fear that Carolyn would harm herself or Madison. (R. 45-32; *Thompson supra,* 2002 UT App 63, ¶ 7, 44 P.3d at 830 (including footnote 1). Carolyn denied telling Thompson she was having suicidal thoughts, or that she intended to harm herself or Madison. (R. 45-27). Officer Bastian testified that Thompson never told him of any concern he had about his wife's mental state or health during the early morning telephone conversation. (R. 45-29-30). Thompson admitted he said nothing to Officer Bastian at the apartment about any suicidal intention of Carolyn or of any threat she made to harm herself or Madison. (R. 45-22-23).

SUMMARY OF ARGUMENTS

The Utah Court of Appeals properly affirmed Thompson's bench trial conviction for violating part of Utah Code Ann. § 76-9-201(b). The state has legitimate interests in

protecting the public from telephone calls made with the intent to harass, intimidate or annoy, particularly when repeated calls are made after the caller has been told to stop calling. Abundant evidence supports the trial court determination of Thompson's guilt and the Court of Appeals' affirmation of his conviction. Thompson has not appealed the decision of the Utah Court of Appeals.

The Court of Appeals committed reversible error in declaring other parts of Utah Code Ann. § 76-9-201(b) to be facially overbroad, and thus, unconstitutional. The statute in question regulates intentional misconduct, not the free expression of protected speech. Repeated instances of verbal harassment by telephone are not free speech. Imaginable, though remote, hypothetical situations should not invalidate a statute whose terms are limited to proscribing behavior intended to harass innocent people. The state may properly proscribe telephone messages which are repeatedly conveyed with an intent to intimidate, alarm or threaten another, regardless of whether conversation actually ensues.

ARGUMENT

POINT I

THOMPSON WAS PROPERLY CONVICTED OF VIOLATING § 76-9-201(b) OF UTAH'S TELEPHONE HARASSMENT STATUTE.

THE COURT OF APPEALS CORRECTLY AFFIRMED BOTH HIS CONVICTION AND THE CONSTITUTIONALITY OF PART OF §76-9-201(b).

The Court of Appeals opinion recognizes that the state has a legitimate interest in protecting the public from threatening, menacing telephone conversations. *Thompson,*

supra 2002 UT App 63, ¶ 17, 44 P.3d at 832. *See also Thorne v. Bailey,* 846 F.2d 241 (4th Cir. 1988) (" . . . The government has a strong and legitimate interest in preventing the harassment of individuals. . . . Because the telephone is normally used for communication does not preclude its use in a harassing course of conduct" *Thorne, supra* 846 F.2d at 243). In *Thompson*, the Court of Appeals affirmed Thompson's conviction and the constitutionality of part of § 76-9-201(b) because three factors coalesced. First, Thompson intended to annoy Carolyn; second, Carolyn told him not to call anymore; and third, Thompson continued to call despite her requests that he stop. *Thompson,* 2002 UT App 63, ¶ 24, 44 P.3d at 834. Each of these elements is amply evidenced in the record. (R. 45-6, 7, 8, 13, 15) and together they form the basis for the trial court's finding of Thompson's guilt (R. 45-32, 33). In order for an appellate court to overturn the trial court's findings of fact those findings must be shown to be clearly erroneous. *State v. Moosman,* 794 P.2d 474, 475-75 (Utah 1990). Here, the bench trial judge's findings are abundantly supported by credible evidence which easily sustains his decision. The Court of Appeals properly affirmed those findings and upheld conviction. Thompson did not appeal the decision of the Utah Court of Appeals within the time required by Utah R. App. P. Rule 4(a) (1990) .

The Court of Appeals also held that part of § 76-9-201(b) was constitutional and survived First Amendment challenges grounded in alleged facial overbreadth and vagueness. *Thompson, supra,* ¶ 27, 44 P.3d at 834-35. While a constitutional challenge

to a statute raises a legal issue to be reviewed by this Court on a correctness standard, the presumption is that the statute is valid. All reasonable doubts should be resolved in favor of constitutionality. *State v. Lopes,* 980 P.2d 191, 193 (Utah 1999) (dictum); *Mohi, supra,* 901 P.2d at 995 (Utah 1999). Courts in sister states have upheld the validity of telephone harassment statutes similar to Utah's. *State v. Richards,* 896 P.2d 357, 361-63 (Ida.App. 1995). *See also, State v. Musser,* 977 P.2d 131, 132-33 (Ariz. 1999). While Provo disagrees with that part of the Court of Appeals decision in *Thompson* which held some of § 76-9-201(b) unconstitutional, the other portions of the opinion which upheld Thompson's conviction and the validity of the rest of § 76-9-201(b) should be affirmed.

POINT II

THE COURT OF APPEALS IMPROPERLY INVOKED THE "FACIAL OVERBREADTH" DOCTRINE TO STRIKE DOWN PART OF §76-9-201(b). THE UTAH STATUTE AIMS AT REGULATING IMPROPER CONDUCT, NOT CONSTITUTIONALLY PROTECTED SPEECH. THEORETICAL, UNREALISTIC AND HYPOTHETICAL SITUATIONS DO NOT INVALIDATE A STATUTE WHICH SPECIFICALLY REQUIRES CRIMINAL INTENT IN ORDER FOR CONDUCT TO BE ACTIONABLE.

a) The concept of facial overbreadth should be sparingly applied and then only to statutes which substantially intrude upon protected activity.

Governments and courts must be sensitive to laws which impermissibly curtail speech protected by the First Amendment to the United States Constitution. A statute which is overbroad on its face may be declared invalid if it violates the First Amendment. But a leading United States Supreme Court decision has held that the doctrine of facial overbreadth is to be sparingly applied, "only as a last resort," and should not be invoked

when a limiting construction can properly be applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). *See also, New York v. Ferber,* 458 U.S. 747, 769 (1982). A statute will not be held overbroad unless it makes unlawful a substantial amount of constitutionally protected conduct. *Salt Lake City v. Lopez,* 935 P.2d 1259, 1263 (Utah App. 1997). In *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991), a federal court held that a claim of facial overbreadth involving a state telephone harassment law would be upheld only if:

> . . . there is a significant imbalance between the protected speech the statute should not punish and the unprotected speech it legitimately reaches: ' Overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' [citation omitted] The defendant must demonstrate 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court' before a statute will be struck down as facially overbroad [citation omitted]. *The fact that a court can hypothesize some deterrent effect on protected speech is insufficient for overbreadth purposes. . . Shackelford, supra,* 948 F.2d at 940 (emphasis supplied).

Where a statute, such as Utah Code Ann.76-9-201, is directed against offensive conduct and not to any legitimate communication of ideas, courts have been unwilling to extend the facial overbreadth doctrine unless there is a showing of a likely and substantial incursion into protected speech. *Lopez, supra,* 935 P.2d at 1263. In *Broadrick, supra,* the United States Supreme Court emphasized that the more a statute's clear purpose is to regulate conduct which disturbs public peace, and the statute's subject matter shifts away from protected speech and focuses instead on offensive criminal behavior within the legitimate scope of the state's interests, the less likely it is that a court will uphold an overbreadth challenge:

> . . . [F]acial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuates as . . .unprotected behavior . . . moves from 'pure speech' toward conduct [which]–even if expressive–falls within the scope of otherwise valid criminal laws that reflect legitimate state interests. . . over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect–at best a prediction–cannot with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe [citation omitted]. *Broadrick, supra* 406 U.S. at 615. *And see. Members of the City Council of Los Angeles v. Vincent,* 466 U.S. 789, 799-800 (1984).

In upholding Idaho's telephone harassment statute against a claim of constitutional overbreadth, the Idaho Court of Appeals noted: "The strength of an overbreadth challenge diminishes where the statutory proscription is directed at behavior other than pure speech." *Richards, supra,* 896 P.2d at 362 [citation omitted]. In *Gormley v. Director, Connecticut Department of Probation,* 632 F.2d 938 (2d Cir.1980), a United States Court of Appeals upheld a Connecticut telephone harassment statute (quite similar to Utah's):

> Harassing telephone calls are an unwarranted invasion of privacy. They appear to be on the increase. They are properly outlawed by federal and state statutes. The possible chilling effect on free speech of the Connecticut statute strikes us as minor compared with the all-too-prevalent and widespread misuse of the telephone to hurt others. The risk that the statute will chill people from, or *prosecute them for, the exercise of free speech is remote.* The evil against which the statute is directed is both real and ugly. *Gormley, supra,* 632 F.2d at 942 (emphasis added).

And see, City Council of Los Angeles, supra, where the United States Supreme Court observed that an " . . . incidental restriction on alleged First Amendment freedoms . . .

no greater than is essential to the furtherance of . . . [a legitimate] interest" is justified if the state legislation is within the constitutional power of the state, fosters an important governmental interest, and is unrelated to the suppression of protected expression. *City Council of Los Angeles, supra,* 466 U.S. at 805.

Applying these principles to Utah Code Ann. § 76-9-201 it is apparent that the Utah telephone harassment statute is directed at offensive conduct, i.e. misuse of the telephone, made with a criminal intent to "annoy, alarm, intimidate, offend, abuse, threaten, harass or frighten" another. The statute does not attempt to regulate telephone conversations which are made for legitimate communicative purposes or the content of any such calls. Any intrusion of the statute into areas of protected speech is not only insubstantial, but remote. The plain language of § 76-9-201 only addresses telephone calls in which the speaker has a specific, criminal intent to disturb another's legitimate rights to peace and privacy. The statute's plain language is limited to criminal misuse of the telephone where one intends to inflict abuse or suffering on the person called.

b) Where a statute is primarily directed at regulating criminal misconduct, and only peripherally affects protected speech, facial overbreadth is of limited applicability, particularly where the statute requires criminal intent.

A number of cases have recognized that where a statute requires specific criminal intent to do a prohibited act, such requirement decreases the possibility that such statute is void for vagueness. In *Screws v. United States,* 325 U.S. 91 (1945), the United States Supreme Court wrote:

> . . . The Court, indeed has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . [W]here punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. *Screws, supra,* 325 U.S. at 101-102. *See also United States v. Lampley,* 573 F.2d 783, 787 (3rd Cir. 1978) (telephone harassment case).

A number of decisions have applied the specific intent standard not just to the issue of vagueness, but to the overbreadth question as well. In *Lopez,* the Utah Court of Appeals noted:

> . . . '[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' [citing *Broadrick, supra* 413 U.S. at 615]. *Lopez, supra,* 935 P.2d at 1263.

And see footnote 8 in the decision *Connecticut v. Roesch,* 1995 Conn. Super. LEXIS 1751, 1, where a state superior court noted in a telephone harassment case:

> . . . The specific intent requirement of the harassment statute is also an important factor militating toward a finding of *unsubstantial overbreadth.* [citation omitted]. That same specific intent element can save an otherwise overbroad statute because such a requirement narrows the statute's applicability by excluding from its ambit those whose expression may have innocently or unknowingly caused a disturbance. *Roesch, supra,* 1995 Conn. Super. LEXIS 1751 at 17-18. (emphasis supplied).

In *Ferber*, the United States Supreme Court upheld the conviction of one charged with violating New York's obscenity statute. In affirming the defendant's conviction, the

Supreme Court indicated: "We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Ferber, supra* 458 U.S. at 773. The Supreme Court also reemphasized its prior rulings that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well . . ." *Ferber, supra,* 458 U.S. at 770. In a footnote to its opinion, the Court explained:

> . . . "This Court has . . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . [citations omitted].'" *Ferber, supra* 458 U.S. at 770 (footnote 25).

The Utah statute punishes only telephone calls made with criminal intent to annoy, alarm, intimidate, offend, abuse, threaten, harass or frighten another. While subsections (a) through (e) of old § 76-9-201 outline specific kinds of prohibited calls,[3] the threshold finding for conviction under all those subsections is whether the caller intentionally, and with criminal design, attempted to disturb another's legally protected rights to peace and

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[3]In *Provo City v. Whatcott,* 2000 UT App. 86, ¶¶ 11, 13, 16, 1 P3d 1113, 1115-16 (Utah App. 2000), the Court of Appeals struck down sections (a) and (d) of § 76-9-201 and appears to have voided language in the statute about "recklessly creating a risk (*Whatcott, supra* at ¶ 11, 1 P.3d at. 1115. The *Whatcott* holding as to old sections (a) and (d) are not involved in Provo's petition for its writ of certiorari before this Court.

privacy. The Utah statute does not attempt to regulate the sharing or dissemination of any constitutionally protected speech. Rather, it seeks to limit the actions of those who use telephones with a specific intent to cause grief and mental havoc. Facial overbreadth should not shield those who try to plague others by misusing modern technology.

c) Conceivable, but remote or theoretical or unrealistic, constraints on protected speech should not invalidate a statute which, by its terms, restricts only intentional, criminal misconduct, not free communication of ideas.

Shackelford, supra involved a telephone harassment matter in which the Fifth Federal Circuit Court affirmed defendant's conviction. One of the issues on appeal was whether a state statute which prohibited making telephone calls " . . . with intent to terrify, intimidate or harass and threaten . . ." was facially overbroad. *Shackelford, supra* 948 F.2d at 937. The Court of Appeals observed the general principle that: ". . . [T]he fact that a court can hypothesize some deterrent effect on protected speech is insufficient for overbreadth purposes." *Shackelford, supra 948 F.2d at 940. See also, Lopez, supra* 935 P.2d at 1263-64. Similarly, in *City Council of Los Angeles, supra,* the United States Supreme Court wrote:" . . . [T]he mere fact that one can conceive of some impermissible application of a statute is not sufficient to render it susceptible to an overbreadth challenge." *City Council of Los Angeles, supra* 466 U.S. at 800. In a footnote to that opinion, the Court cited with approval portions of a law review article:

> . . . The bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches

> substantially beyond the permissible scope of legislative regulation. *City Council of Los Angeles, supra,* 466 U.S. at 800 (footnote 19). (Citing Jeffries, Rethinking Prior Restraint, 92 *Yale L. J. 409, 425 (1983)).*

Two sister state opinions reach similar conclusions. In *State v. Musser, supra*, an en banc decision of the Arizona Supreme Court interpreted the constitutionality of a state telephone harassment statute which provided in part that it was unlawful " . . . for any person with intent to terrify, intimidate, threaten, harass, annoy or offend, to use a telephone . . .[to] threaten to inflict injury or physical harm . . ." The defendant argued that the statute could chill free speech of one who wished to file a civil suit, fire an employee, or boycott a restaurant which engaged in racial discrimination." *Musser, supra* 977 P.2d at 131-132. The Arizona Supreme Court disagreed:

> . . . While Musser [the defendant] has conceived of some impermissible applications of the statute, he has provided no indication that any likelihood exists that the state would use the statute to reach such activities. Indeed, interpreting the statutory language to permit prosecution for such activities would require the state and the courts to expand the statute's reach considerably beyond that which the legislature intended. [citation omitted]. *Musser, supra* 977 P.2d at 132-33.

And in *Richards, supra,* the Idaho Court of Appeals also affirmed the conviction of one convicted for violating Idaho's telephone harassment statute. That statute forbade one from making improper use of the telephone " . . . with the intent to annoy, terrify, threaten, intimidate, harass or offend . . ." *Richards, supra,* 896 P.2d at 357, another

person. One of the issues on appeal was whether the Idaho statute violated the First Amendment because of the law's alleged overbreadth. The court rejected the defendant's argument, holding:

> . . . The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited. Harassment, in this case, thus is not protected merely because it is accomplished using a telephone. [citations omitted].
>
> By requiring that the sole intent of the call be to annoy, terrify, threaten, intimidate, harass or offend, the statute places outside of its ambit calls which, though they may insult or offend the recipient, carry a legitimate purpose such as conveying a complaint about a business practice or government policy or attempting to persuade the hearer to a particular social, religious or political point of view. Consequently, we see little risk that the statute will have a chilling effect on the bona fide exercise of free speech. *Richards, supra* 896 P.2d at 362.

In its opinion in this case, the Court of Appeals wrote that Utah Code Ann. §76-9-201(1)(a) can be read to ". . . prohibit a potentially huge universe of otherwise legitimate telephone calls." *Thompson, supra* 2002 UT App. 63 at ¶ 17, 44 P.3d at 832.[4] The Court then posited five examples showing the alleged overbreadth of old subsection (1)(a), even though in its earlier *Whatcott* decision the Court had already stricken that subsection and even though Thompson involved a conviction under (1)(b) of the old statute. *Thompson, supra,* 2002 UT App. 63, at ¶ 18, 44 P.3d at 832-33 (again citing *Whatcott, supra,* 2000 UT App. at ¶ 14, 1 P.3d at 1115). The five examples include: 1) unwanted telephone

[4]Citing *Whatcott, supra,* 2000 UT App. 86, at ¶¶ 10-11, 1 P.3d at 1115.

solicitations, presumably made by a telemarketer, during a dinner hour; 2) calls by a frantic mother to confirm the well-being of a young adult who recently moved out of the family home; 3) a consumer's complaint about product's lack of performance made to a seller or producer of the product; 4) calls from a businessman to another to protest the latter's failure to honor a contract; and 5) a constituent's call to a legislator in protest of the lawmaker's stand on a political issue. In each of these five instances, the Court of Appeals assumed there was a ". . substantial likelihood that the call would annoy . ." *the recipient. Thompson, supra* 2002 UT App. 63 at ¶ 18, 44 P.3d at 832-33 (emphasis supplied). However (and apart from the argument that the each of the five examples by the Court's own language pertains to a subsection no longer in force), a careful review of each the five Court of Appeals hypothetical situations reflects speech which *could not* be actionable under the old or present telephone harassment statute.

Provo respectfully submits that the first flaw in the Court of Appeals reasoning is that its five examples focus only on the "annoyance" of the call *recipient* of the telephone call. But the statute does not address the mental state of the person who receives the call. It is the *criminal intent of the caller* that is determinative.. Liability under § 76-9-201 arises only when the *person who makes the call* does so " . . with intent to annoy, alarm, . . intimidate, offend, abuse, threaten, harass or frighten" the person called. § 76-9-201(1).

The distinction between criminal intent of the caller and the subjective state of mind of the recipient of the call was central to the Michigan Court of Appeals decision in

People v. Taravella, 350 N.W.2d 780 (Mich. App. 1984), a case involving Michigan's public communication harassment statute. That law rendered unlawful the use of a communications system " . . . with intent to terrorize, frighten, intimidate, threaten, harass, molest or annoy . . ."another person. *Taravella, supra* 350 N.W.2d at 782. In affirming the lower court conviction of the defendant the Michigan court held:

> Do telephone calls by an angry parent to a student with failing grades, by a dissatisfied consumer or by a disgruntled constituent, if accompanied by language thought to be "offensive" by the recipient of the call, subject the caller to criminal sanctions under the statute? In each case, defendant claims, the caller's exercise of his constitutional right of free speech might "annoy," "frighten" or be considered "obscene" or "harassing" by the listener. Thus, under defendant's interpretation of the statute, it is the listener's perception or characterization of the nature of the call which would control. We disagree. The statute clearly provides that the focus is on the caller; it is the malicious intent with which the transmission is made that establishes the criminality of the conduct. [citation omitted]. Thus, irrespective of the listener's subjective perceptions, without the necessary intent on the part of the caller the use of obscene words alone would not fall within the statutory proscriptions. *Taravella, supra,* 350 N.W.2d at 784.

The second flaw in the Utah Court of Appeals reasoning in *Thompson* is that all five of its examples ignore the caller's state of mind. One whose dinner cools may resent a telemarketer's solicitation, a young person might strafe at a mother's attempts to intrude into his newly-claimed freedom, a producer can feel pressure because a buyer expresses dissatisfaction with a product, a businessman could take umbrage when a colleague claims he has breached a contract, and a politician bristle when his political position is not

appreciated by a constituent. But *none* of the emotions felt by any of the call recipients are material elements in a telephone harassment criminal claim. Instead, the crucial fact is the intent of the caller. In none of the five examples is there any conduct or speech of the caller which could possibly result in criminal liability. The telemarketer's intent is to make a sale, the mother wishes to be assured of her child's well-being, the buyer is worried about a malfunctioning product, a businessman about the viability of a contract and a voter about issues he believes have political importance. Each of the five situations involves a legitimate interest of a caller which is far beyond the pale of any conceivable prosecution. In none of the examples is there the remotest suggestion that any caller had the criminal intent necessary for a conviction under § 76-9-201.

d) Harassment made with criminal intent is not protected free speech.

In *Lampley, supra* the majority opinion of the Third Circuit upheld the validity of a United States telephone harassment statute which forbade calls made " . . . with intent to annoy, abuse, threaten or harass any person at the called number." 573 F.2d at 785. In its opinion upholding the defendant's lower court conviction, the Federal court noted:

> . . . The appellant has not claimed, nor could he successfully do so, that it is beyond the power of the Congress to impose criminal sanctions on the placement of interstate telephone calls to harass, abuse or annoy. Not all speech enjoys the protection of the first amendment. [citations omitted]. . . . Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives. [citations omitted]. *Lampley, supra* 573 F.2d at 787.

Similarly, a Fourth Federal Circuit Court decision, *Thorne v. Bailey, supra*, is a case in which the circuit court affirmed lower court decisions which convicted defendant of violating the West Virginia telephone harassment statute. Citing language from the state Supreme Court's plurality opinion, the circuit court indicated:

> Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited. Harassment, in this case, thus is not protected merely because it is accomplished using a telephone.[citation omitted]. *Thorne, supra* 846 F.2d at 243.

See also, Richards, supra 896 P.2d at 362 (citing the same language from the West Virginia State Supreme Court in *Thorne, supra* 333 S.E.2d 817, 819 (1985).

And finally, in *DeWillis v. Texas,* 951 S.W.2d 212 (Tex. App. 1997), a case involving the Texas telephone harassment statute, the Texas Court of Appeals affirmed a trial court verdict against a defendant who claimed the statute was unconstitutionally vague. The state statute in part was addressed to one who made telephone calls and thereby ". . . intentionally, knowingly or recklessly annoys or alarms the recipient." *DeWillis, supra* 951 S.W.2d at 215. Disposing of the defendant's attack on the statute, the Texas Court noted:

> . . . [W]e find no authority supporting the proposition that causing another person's telephone to ring repeatedly or repeatedly making anonymous telephone calls is a constitutionally protected activity under the First Amendment . . . . *DeWillis, supra,* 951 S.W.2d at 217.

The cited case law strongly suggests that misuse of the telephone made with intent to harass is not speech which is entitled to First Amendment protection. The language of Utah Code Ann. § 76-9-201(1) (b) specifically requires a finding of criminal intent before a person may be convicted pursuant to its provisions. The statute thus properly restricts unprotected conduct, but does not impinge on protected speech and should be upheld.

e) The prohibition of repeated phone calls made with criminal intent to annoy, harass, intimidate, threaten, frighten or abuse is a legitimate subject of state power. One who violates a statute which prohibits these practices may properly be punished for his intentional conduct, whether or not a conversation actually ensues.

The version of § 76-9-201(1)(b) in effect at the time of Thompson's conviction and the amendment subsequent to his conviction each provide that if one uses a telephone with intent to annoy, harass, etc. another, the person making the call may violate the statute if he or she: 1) makes repeated telephone calls, whether or not a conversation ensues; 2) makes repeated calls after having been told not to call back; or 3) causes the telephone of another to ring repeatedly or continuously. The facts in this case involve the second category, i.e. making repeated calls after having been told not to call back. As argued in Point I of this brief, the finding of the Court of Appeals affirming Thompson's conviction should be upheld. But the Court of Appeals also invoked the doctrine of facial overbreadth to strike down the first part of § 76-9-201(1)(b), namely making repeated calls where no actual conversation takes place. The lower court opined ". . . prohibiting repeated calls rather than only single calls does little to narrow the field of otherwise legitimate communications . . ." *Thompson, supra,* 2002 UT App 63, ¶ 20, 44 P.3d at

833. Implicit in the Court of Appeals holding is the concept that one may freely and repeatedly annoy, harass, threaten, etc., until one is told to stop. *Thompson, supra,* 2002 UT App 63, ¶ 24, 44 P.3d at 834. At a minimum the court appears to give every caller at least one free harassment call, and more unless the recipient instructs the caller not to call again. An actual conversation first must occur between the telephone caller and the recipient before there can be telephone harassment even if repeated messages are left.

But in an age of answering service and message forwarding, harassment *can and does* occur even if a hearer is not actually on the line at the time the call is made. One can repeatedly leave false messages from a public telephone that harm has befallen a call recipient's family member or friend; one can phone repeatedly at all hours of the night and hang up before the caller responds; one can leave false, anonymous threats that a person will be sued or arrested or convey embarrassing untruths about someone's spouse or family member. But according to the Court of Appeals ruling, as there has been no request to stop calling, there is no violation of the statute even if the caller is unable to tell who made the call or where it originated.

Courts in other jurisdictions have upheld the validity of telephone harassment statutes which prohibit harassment even if no conversation ensues. In *New York v. Shack,* 658 N.E.2d 706 (N.Y. 1995), the highest New York court upheld the conviction of a defendant who violated the state's telephone harassment statute. That statute prohibited making a call " . . . with intent to harass, annoy, threaten or alarm [when] he . . [m]akes a telephone call, whether or not a conversation ensues, with no purpose of legitimate

communication." *Shack, supra,* 658 N.E.2d at 709. The defendant left many messages on his former psychologist's answering machine, threatened to make calls to her family and extended family members. He left word that if she would not return his calls, he would sell her telephone number to a "pervert" who would delight in making her life miserable. He also threatened to call a state licensing board and have her license to practice revoked. *Shack, supra* 658 N.E.2d at 709-710. In upholding the conviction the New York Court of Appeal rejected the defendant's contention that the state telephone harassment statute was constitutionally overbroad. *Shack, supra* 658 N.E.2d at 711-12.

In *Gormley, supra,* the United States Second Circuit Court of Appeals reviewed a Connecticut statute which prohibited use of the telephone " . . . with intent to harass, annoy or alarm another person . . . whether or not a conversation ensues . . ." *Gormley, supra* 632 F.2d at 940. In upholding the state statute against defendant's claim that it was facially overbroad, the court wrote:

> The asserted overbreadth of the Connecticut statute is circumscribed by the elements of the offense it proscribes. To run afoul of the statute, a telephone call must be made not merely to communicate, but "with intent to harass, annoy or alarm" . . . Whether speech actually occurs is irrelevant, since the statute proscribes conduct, *whether or not a conversation actually ensues. Gormley, supra* 632 at 942. *See also, Pennsylvania v. Hendrickson,* 684 A.2d 171, 175-76 (Pa. Super. 1996).

And in *Lampley, supra* the Third Circuit Court of Appeals upheld a United States statute which made it unlawful ". . . to make a telephone call, whether or not conversation ensues . . . with intent to annoy, abuse, threaten or harass . . ." *Lampley, supra*, 573 F.2d

at 785. One of the defenses raised by the defendant was that in some of the conversations he had not directly spoken to the person he was calling. The Circuit Court rejected this argument, holding in part:

> . . . Nor is it necessary, as appellant suggests, that the call recipient verbally respond to the operator's words. Communication sufficient to constitute "conversation" occurs when the operator speaks to the listening recipient. *Lampley, supra* 573 F.2d at 788.

The preceding authorities all suggest that a conviction based on a telephone caller's improper criminal intent may properly be affirmed regardless of whether a conversation has actually taken place and that a statute so providing is not constitutionally defective.

f) Telephone harassment statutes similar to Utah's have often been upheld by courts in other jurisdictions.

Throughout this brief Provo has made mention of telephone harassment laws in other jurisdictions which have been sustained against claims of facial overbreadth. *E.g. Taravella, supra,* 350 N.W.2d at 785 (and cases cited). In many respects the Idaho state statute relevant to *Richards, supra* is similar to Utah's statute § 76-9-201. *See* Idaho Code §18-6710, cited in *Richards, supra* 896 P.2d at 361. Like Utah's statute, the Idaho telephone harassment law includes language about both an "intent to annoy, terrify, threaten, intimidate, harass or offend" and " . . . repeated anonymous or identified telephone calls whether or not conversation ensues . . ." The Idaho statute was upheld by the Idaho Court of Appeals in 1995. Also in 1995 New York's highest court upheld the telephone harassment conviction in *Shack*, a case where many of the threatening calls

were made on an answering machine and there was no one physically present on the other line of the call. *Shack, supra* 658 N.E. at 709-10, 714. In *Thorne,* the Fourth Circuit Court of Appeals affirmed a defendant's conviction and the validity of a West Virginia telephone harassment statute which proscribed use of a telephone " . . . with intent to harass or abuse another . . . whether or not conversation ensues." W.Va. Code § 61-8-16(a), cited in *Thorne, supra* 846 F.2d at 242, 243, 245. *See also, Gormley, supra* 632 F.2d at 943; *Hendrickson, supra* 684 A.2d at 175-76, 179. Provo recognizes there are earlier decisions which struck down telephone harassment statutes, *e.g. People v. Klick,* 362 N.E.2d 329 (Ill. 1977), *Bolles v. People,* 541 P.2d 80 (Colo. 1975) (en banc), but urges that the better reasoned and generally more recent cases frequently uphold statutes similar to Utah Code Ann. § 76-9-201.

CONCLUSION AND PRECISE RELIEF SOUGHT

As argued in Part I of the Argument section of its brief here, Provo asks that this Court affirm that portion of the Court of Appeals decision which upheld Thompson's conviction and the validity of the second part of Utah Code Ann. § 76-9-201(1)(b). For all the reasons outlined in Argument II of this brief, Provo requests that the Court overrule that part of the lower appellate court's decision which declared the first part of § 76-9-201 (1)(b) to be facially overbroad and thus unconstitutional.

DATED this 21 day of November, 2002.

VERNON "RICK" ROMNEY
Deputy Provo City Attorney
Counsel for Plaintiff-Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Brief of Petitioner to Dana M. Facemyer, 3507 North University, Suite # 150, Jamestown Square, Hanover Bldg., Provo, Utah 84604 this 21 day of November, 2002.

Utah Code Ann. @ 76-9-201

@ 76-9-201. Telephone harassment

(1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm, intimidate, offend, abuse, threaten, harass, or frighten another at the called number, the person:

(a) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;

(b) makes a telephone call and insults, taunts, or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response; or

(c) makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person.

(2) Telephone harassment is a class B misdemeanor.

Addendum A

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: SCA ₵
₵ 01-22-01 9:38 AM ₵

S.B. 141

TELEPHONE HARASSMENT AMENDMENTS

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Terry R. Spencer

This act modifies the Criminal Code by deleting language regarding the offense of telephone harassment that has been found unconstitutional by the Utah Supreme Court.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

76-9-201, as last amended by Chapter 28, Laws of Utah 1996

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-9-201** is amended to read:

76-9-201. Telephone harassment.

(1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm [~~another~~], intimidate, offend, abuse, threaten, harass, or frighten [~~any person~~] another at the called number [~~or recklessly creating a risk thereof~~], the person:

[~~(a) makes a telephone call, whether or not a conversation ensues;~~]

[~~(b)~~] (a) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;

[~~(c)~~] (b) makes a telephone call and insults, taunts, or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response;

§ [~~(d) (c) makes a telephone call and uses any lewd or profane language or suggests any lewd or lascivious act;~~] § or

[~~(c)~~] § [~~(d)~~] (c) § makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person.

(2) Telephone harassment is a class B misdemeanor.

Legislative Review Note
as of 1-11-01 1:53 PM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

IN THE UTAH COURT OF APPEALS

—ooOoo—

Provo City,
Plaintiff and Appellee,

v.

Sean G. Thompson,
Defendant and Appellant.

OPINION
(For Official Publication)

Case No. 20000071-CA

FILED
March 7, 2002
2002 UT App 63

Fourth District, Provo Department
The Honorable Anthony W. Schofield

Attorneys:
Dana M. Facemyer, Provo, for Appellant
Vernon F. Romney, Provo, for Appellee

Before Judges Jackson, Greenwood, and Orme.

ORME, Judge:

¶1 Defendant Sean G. Thompson appeals from a bench trial conviction of telephone harassment, a class B misdemeanor, in violation of Utah Code Ann. § 76-9-201 (1999), as adopted by Provo City. Defendant argues that section 76-9-201 is both unconstitutionally overbroad and unconstitutionally vague. He also argues that he received ineffective assistance of counsel. We conclude that portions of section 76-9-201 are indeed facially overbroad. However, we affirm defendant's conviction because we conclude that the portion of subsection 76-9-201(1)(b) most applicable to defendant's actions is neither facially overbroad nor void for vagueness, and because we find no merit in defendant's ineffective assistance claim.

BACKGROUND

¶2 "When reviewing a bench trial, '[w]e recite the facts from the record most favorable to the findings of the trial court.'" State v. Layman, 953 P.2d 782, 784 n.1 (Utah Ct. App. 1998) (quoting State v. Moosman, 794 P.2d 474, 476 (Utah 1990)). "We present conflicting evidence only when necessary to understand issues raised on appeal." State v. Kruger, 2000 UT 60 ¶2, 6 P.3d 1116

¶3 In early May 1999 defendant's ex-wife, Carolyn, and their five-month-old daughter lived alone in an apartment in Provo City During the late evening of May 1, and the early morning of May 2, 1999, defendant phoned Carolyn ten times within the space of an hour Carolyn told defendant two or three times that his calls were frightening her and asked him to quit calling When defendant continued to call, Carolyn phoned the police

¶4 Officer Bastian arrived at Carolyn's apartment at 12 47 a m and observed that Carolyn was "nervous, emotional, [and] appeared kind of scared " She told Officer Bastian that defendant "had been calling her and upsetting her by his frequent phone calls and [that] she just wanted him to stop " As Officer Bastian spoke with Carolyn, the phone in her apartment rang again The phone's caller identification function indicated that the call was from defendant bringing his total calls to eleven within the hour

¶5 Officer Bastian answered the phone and asked who was calling Defendant identified himself Officer Bastian told defendant not to leave his apartment because he, Officer Bastian, would soon be arriving Officer Bastian then went to defendant's apartment and cited defendant for telephone harassment

¶6 Defendant claimed at trial that Carolyn initiated the first telephone call and expressed suicidal intentions Defendant said he had "learned in school and from counselors and therapists" that "whenever you're faced with a situation where you're talking with somebody who is threatening to commit suicide , as soon as they hang up you immediately call them back to get them on the line and keep talking to them, and if they hang up, call back " Thus he claimed he did not call Carolyn repeatedly with any intent to annoy her, but only out of concern for her safety

¶7 Defendant failed however, to mention any of his concerns for Carolyn's safety to Officer Bastian either when Officer Bastian first spoke to defendant on the telephone[1] or when Officer Bastian arrived at defendant s apartment Instead Officer Bastian testified that defendant admitted he had been drinking and that he had also taken antidepressant medication Defendant testified that when Officer Bastian scolded him for drinking too much he became concerned because Officer Bastian threatened to arrest him and simply forgot to mention his for Carolyn

8 Following a bench trial, defendant was found guilty of telephone harassment Specifically, the trial court found that defendant made "a large number of telephone calls" to Carolyn, that "she asked the defendant not to make additional calls and yet he continued to do so" and that defendant's "clear intent [was] to annoy " Defendant now appeals

ISSUES AND STANDARD OF REVIEW

9 Defendant claims he received ineffective assistance of counsel We generally will not review a claim of ineffective assistance of counsel on direct appeal unless the defendant is represented by new counsel on appeal and the record is adequate to review the defendant's claims See State v Maestas 1999 UT 32,¶20, 984 P 2d 76 State v Vessey, 967 P 2d 960, 964-65 (Utah Ct App 1998) If these conditions are met, "we will review ineffective assistance] claims as a matter of law " Maestas, 1999 UT 32 at ¶20 "To establish that he received ineffective assistance of counsel, [defendant] must show that his counsel 'rendered deficient performance which fell below an objective standard of reasonable professional judgment' and that 'counsel's deficient performance prejudiced him '" Id (quoting State v Chacon, 962 P 2d 48, 50 (Utah 1998))

10 Defendant also argues that Utah Code Ann § 76-9-201 (1999) violates the First Amendment of the United States Constitution[2] because it is unconstitutionally overbroad on its face[3] and because it is void for vagueness A constitutional challenge to a statute presents a question of law, which we review for correctness When addressing such a challenge, this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality " State v Lopes, 1999 UT 24,¶6, 980 P 2d 191 (citation omitted)

I Ineffective Assistance of Counsel

11 We only briefly address defendant's ineffective assistance of counsel claims, which are unavailing Defendant claims two deficiencies in his counsel's performance First, he alleges that had counsel properly investigated, counsel would have found evidence that Carolyn had previously shown suicidal tendencies Such evidence, he

claims, would have bolstered defendant's testimony that he did not call repeatedly with intent to annoy but rather to prevent Carolyn from harming herself. However, there is nothing in the record identifying what evidence counsel may have found had he investigated further. Defendant states only in his brief that he "had evidence of a prior occasion in which [Carolyn] threatened to kill herself and all passengers . . . who were with her while she was driving a car." However, defendant did not request a remand under Rule 23B of the Utah Rules of Appellate Procedure to substantiate the assertion he now argues would support his claim of ineffective assistance. Without a proper record before us, we are unable to say whether counsel's alleged deficiency in failing to investigate prejudiced defendant. See State v. Vessey, 967 P.2d 960, 964-65 & n.5 (Utah Ct. App. 1998).

¶12 Defendant also claims counsel's performance was deficient in not drawing more attention to two contradictory statements made by Carolyn. On direct examination, Carolyn said she could not remember whether she had called defendant on the day of the incident, but she said if she had, it was to ask him whether he wanted to come visit their daughter. On cross-examination, Carolyn admitted she had called defendant on the day of the incident, but again said her call was only to ask if he wanted to visit their daughter and that she had not expressed any intent to harm herself. "[I]n reviewing counsel's performance, we give trial counsel wide latitude in making tactical decisions and [do] not question those tactical decisions unless there is no reasonable basis supporting them." State v. Maestas, 1999 UT 32,¶20, 984 P.2d 376. Defense counsel might have considered that successfully impeaching Carolyn's testimony by drawing out the inconsistency was sufficient, and that to delve further into the subject might only have served to highlight the contrast between Carolyn's gracious encouragement of visitation and defendant's subsequent harassing behavior. Thus, we cannot say defense counsel's decision not to pursue the contradiction in Carolyn's testimony fell outside the wide latitude accorded trial counsel in making tactical decisions.

II. Constitutionality of Section 76-9-201

¶13 Defendant argues that Utah Code Ann. § 76-9-201 (1999) is unconstitutionally overbroad on its face and void for vagueness.

> Faced with overbreadth and vagueness attacks on a statute or ordinance, our first task is to determine whether the enactment makes unlawful a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail and we should then examine the facial vagueness challenge. If it does, it may be held facially invalid even if it also has legitimate application.

Logan City v. Huber, 786 P.2d 1372, 1375 (Utah Ct. App. 1990) (citations omitted).

¶14 At the time of the incident giving rise to this case, section 76-9-201 read:

> (1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number or recklessly creating a risk thereof, the person:
>
> (a) makes a telephone call, whether or not a conversation ensues;
>
> (b) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;
>
> (c) makes a telephone call and insults, taunts, or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response;
>
> (d) makes a telephone call and uses any lewd or profane language or suggests any lewd or lascivious act; or

(e) makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person

(2) Telephone harassment is a class B misdemeanor

Utah Code Ann § 76-9-201 (1999) [4]

15 The information charging defendant with telephone harassment did not indicate under which subsection of Utah Code Ann § 76-9-201 (1999) he was charged The trial court's findings, however, support a guilty verdict only under subsections (a) and (b) of section 76-9-201 We therefore confine our analysis of section 76-9-201 to subsections (a) and (b), we do not address the constitutionality of the remaining subsections See Provo City v Whatcott, 2000 UT App 86 ¶9 n 2, 1 P 3d 1113

A Subsection (a)

16 In Provo City v Whatcott, which was decided while this case was pending on appeal, we analyzed subsections (a) and (d) of section 76-9-201, concluding that each was unconstitutionally overbroad See id at ¶¶9 2, 16 Whatcott's analysis of subsection (a) forecloses the need to revisit here the question of subsection (a)'s constitutionality See State v Belgard, 615 P 2d 1274 1275-76 (Utah 1980) (holding that a defendant may claim e benefit of appellate decisions issued while the defendant's case is pending final judgment on appeal) Thus, e restate Whatcott s analysis of subsection (a) only as useful prelude to our similar analysis of subsection (b)

7 An enactment which is unconstitutionally overbroad "is one 'which does not aim specifically at evils within the owable area of state control but on the contrary sweeps within its ambit other activities that in ordinary cumstances constitute an exercise of freedom of speech or the press '" Logan City v Huber, 786 P 2d 1372, 375 (Utah Ct App 1990) (quoting Thornhill v Alabama 310 U S 88, 97, 60 S Ct 736, 741-42 (1940)) dditional citation omitted) In Whatcott we said of section 76-9-201

esumably the Legislature intended to prohibit threatening and menacing calls, and calls that would provoke a each of the peace This is certainly within the Legislature's power, and does not offend the First Amendment

> But section 76-9-201 sweeps even more broadly Under subsection (a), the statute prohibits any "telephone call, whether or not a conversation ensues," where the caller has "recklessly creat[ed] a risk" of "annoy[ing], alarm[ing] , intimidat[ing] offend[ing], abus[ing], threaten[ing] harass[ing] or frighten[ing] the recipient Id Read thus, the statute would prohibit a potentially huge universe of otherwise legitimate telephone calls

00 UT App 86 at ¶¶10-11

8 We then gave five example categories of legitimate calls prohibited under subsection (a) (1) "unwanted ephone solicitations made to a private home during the dinner hour", (2) calls from a mother to "a young adult o has recently moved out of the family home," which the mother makes in order "to make sure he is alright," d which she continues to make despite "his exasperation (frequently and vocally expressed)", (3) calls from "'a nsumer [to] the seller or producer of a product to express dissatisfaction of product performance'", (4) calls m "'a businessman [to] another to protest failure to perform a contractual obligation'", and (5) calls from "'a nstituent [to] his legislator to protest the legislator's stand on an issue '" Id at ¶¶12, 14 (quoting State v onso, 279 N W 2d 710, 714 (Wis Ct App 1979)) Each of these calls would be prohibited because of the lers' "conscious disregard of the substantial likelihood that the call would annoy [the recipient and thus] bring call within the statute's ambit " Id at ¶12 "These few examples show that the overbreadth of subsection[] (a) . is real and substantial " Id at ¶14 Thus, if defendant's conviction were based solely on subsection (a), we uld be constrained to reverse

B Subsection (b)

9 We now turn to an analysis of subsection (b) Subsection (b) contains two parts The first prohibits the "mak of] repeated telephone calls, whether or not a conversation ensues," if the caller acts with the requisite intent,

i.e., "with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number or recklessly creat[es] a risk thereof." Utah Code Ann. § 76-9-201(1)(b) (1999). The second prohibits the "caus[ing of] the telephone of another to ring repeatedly or continuously" if the caller "ha[s] been told not to call back," and if the caller acts with the requisite intent. Id. We discuss each of subsection (b)'s prohibitions separately.

1. Repeated Calling

¶20 Subsection (a) prohibits "a [single] telephone call, whether or not a conversation ensues," if made with the requisite intent. Utah Code Ann. § 76-9-201(1)(a) (1999). The first part of subsection (b) criminalizes "repeated telephone calls, whether or not a conversation ensues," if made with the requisite intent. Id. § 76-9-201(1)(b) (emphasis added). Prohibiting repeated calls rather than only single calls does little to narrow the field of otherwise legitimate communications that subsection (a) unconstitutionally "'sweeps within its ambit.'" Huber, 786 P.2d at 1375 (citation omitted).

¶21 In other words, tracking the examples set out in Whatcott, the telephone solicitor who attempts to call again "at a more convenient time"; the overly anxious mother who calls her grown son repeatedly despite his expressed exasperation; the consumer who calls customer service the first, second, third, and fourth times her computer crashes; the businessman who leaves a voice mail message for his counterpart at another company regarding an unperformed contractual term, then calls again later to speak in person, and then calls a third time—or twenty times—to "keep the pressure on"; and the concerned citizen who calls on different occasions to chastize his legislator for her stance on varied issues might all be subject to prosecution under the first part of subsection (b), as well as under subsection (a). Again, it is the callers' "conscious disregard of the substantial likelihood that the [repeated] call[s] would annoy [the recipient that] bring[s] the call within the statute's ambit." Whatcott, 2000 UT App 86 at ¶12. Because both the first and repeat calls in the above scenarios are legitimate, we hold that the first part of subsection (b) is also facially overbroad and unconstitutional. If defendant's conduct had fit solely under the first part of subsection (b), we would, again, be constrained to reverse.

2. Repeatedly Calling After a Request to Discontinue

¶22 The trial court's findings, however, clearly support defendant's conviction for telephone harassment under the second part of subsection (b). The second part of subsection (b) prohibits "caus[ing] the telephone of another to ring repeatedly or continuously" when one has "been told not to call back," and when one acts with the requisite intent. Utah Code Ann. § 76-9-201(1)(b) (1999). The trial court found that defendant made "a large number of telephone calls" to Carolyn; that "she asked the defendant not to make additional calls and yet he continued to do so"; and that defendant's "clear . . . intent [was] to annoy."

¶23 In order to conclude that a statute is unconstitutionally overbroad "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2918 (1973). We conclude that, unlike subsection (a) and the first part of subsection (b), any possible overbreadth in the second part of subsection (b) is not substantial.

¶24 The distinguishing feature of the second part of subsection (b) is that to be prosecuted under it, one must "hav[e] been told not to call back" and yet, with the requisite intent, nevertheless then "causes the telephone of another to ring repeatedly or continuously." Utah Code Ann. § 76-9-201(1)(b) (1999) (emphasis added). "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention." Kovacs v. Cooper, 336 U.S. 77, 87, 69 S. Ct. 448, 454 (1949) (emphasis added). Clearly, there is no right to audibly invade another's home or place of business by telephone ring in an attempt to commandeer her listening ear when she has affirmatively expressed a desire to be left alone. Cf. id. at 87-88, 69 S. Ct. at 454 ("Opportunity to gain the public's ears by objectionably amplified sound on the streets is more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets."). We see no substantial overbreadth in the second part of subsection (b)'s prohibition.[5]

¶25 Defendant also argues that the intent requirement of section 76-9-201 is unconstitutionally vague. A statute is unconstitutionally vague if persons "'of common intelligence must necessarily guess at its meaning and differ as its application.'" United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997) (quoting Connally v.

General Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926)). We do not believe that persons of common intelligence must guess at whether, after having been told not to call again, causing the telephone of another to ring repeatedly or continuously will create a risk of annoying, alarming, intimidating, offending, abusing, threatening, harassing, or frightening the other person. See Utah Code Ann. § 76-9-201 (1999). It most assuredly will. We thus see no unconstitutional vagueness in the intent requirement of section 76-9-201 as applied to the second part of subsection (b).

¶26 Because the undisputed findings of the trial court place defendant's conduct squarely within the prohibitions of the second part of Utah Code Ann. § 76-9-201(1)(b), which we hold to be constitutional, we affirm defendant's conviction under that portion of the subsection.

CONCLUSION

¶27 We follow our decision in Whatcott that Utah Code Ann. § 76-9-201(1)(a) (1999) is unconstitutionally overbroad on its face. We also conclude that the first part of section 76-9-201(1)(b) is also unconstitutionally overbroad on its face. However, we determine that the second part of subsection 76-9-201(1)(b),[6] prohibiting one from, "after having been told not to call back, caus[ing] the telephone of another to ring repeatedly or continuously," when done with culpable intent, is not unconstitutionally overbroad. Nor is the intent requirement of section 76-9-201 unconstitutionally vague in the context of the second part of subsection (b).

¶28 As defendant's ineffective assistance claim fails, and because his conduct fits squarely within the prohibition contained in the second part of subsection (b), we affirm his conviction for telephone harassment.

Gregory K. Orme, Judge

¶29 WE CONCUR:

Norman H. Jackson,
Presiding Judge

Pamela T. Greenwood, Judge

It is inconceivable that if defendant were truly concerned for Carolyn's safety, his response to Officer Bastian's indication he was on his way to defendant's apartment would not have been something like: "No! You've got to stay with Carolyn. She may try to kill herself."

> [Defendant] also cites the free speech guarantees of the Utah Constitution, Utah Const. art. I, § 15. However, he makes no argument that the state provision should be interpreted any differently than the federal provision . . . . Therefore, we choose to confine our analysis to his arguments based on the first amendment.

Provo City v. Willden, 768 P.2d 455, 456 n.2 (Utah 1989).

Defendant makes only a facial overbreadth challenge to section 76-9-201 and does not argue that it is overly broad as applied to him. "In the First Amendment area, the overbreadth doctrine gives a defendant standing to

challenge a statute on behalf of others not before the court even if the law could be constitutionally applied to the defendant." Salt Lake City v. Lopez, 935 P.2d 1259, 1263-64 n.2 (Utah Ct. App. 1997). See Bigelow v. Virginia, 421 U.S. 809, 814-17, 95 S. Ct. 2222, 2229-30 (1975).

4. Section 76-9-201 has since been amended to delete subsections (a) and (d), which were invalidated in Provo City v. Whatcott, 2000 UT App 86, 1 P.3d 1113. See Utah Code Ann. § 76-9-201 (Supp. 2001) (amendment notes). Former subsections (b), (c), and (e) are now codified, with minor stylistic changes, as subsections (a), (b), and (c), respectively. See id. In this opinion, unless stated otherwise, we refer to each subsection as it appeared in the code version in effect at the time of the incident giving rise to this case.

5. Because of our previous reliance on several examples, we must recognize that the examples of consumers calling customer service, businessmen calling each other regarding contractual terms, and constituents seeking redress of grievances by calling their legislators pose the closer question as to the possible overbreadth of the second part of subsection (b). However, (1) because consumers, businessmen, and constituents each may make initial contact by telephone with producers, fellow businessmen, and legislators, respectively and (2) because further recourse may be pursued through correspondence if the caller is told not to call again, we conclude that the prohibitions in the second part of subsection (b) are not beyond the bounds of constitutionality.

6. As previously indicated, Utah Code Ann. § 76-9-201(1)(b) (1999) is now codified as Utah Code Ann. § 76-9-(1)(a) (Supp. 2001).